No. 85-5023
No. 85-5024

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK GENE POLAND, *Petitioner,*
v.
ARIZONA, *Respondent.*

MICHAEL KENT POLAND, *Petitioner,*
v.
ARIZONA, *Respondent.*

On Writs For Certiorari To The Supreme Court Of Arizona

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

Does the double jeopardy clause of the fifth amendment to the United States Constitution prevent the State of Arizona from reimposing the death penalty following retrial, when on appeal from the first trial, the Supreme Court of Arizona granted a new trial on guilt and struck the only aggravating circumstance to support the death penalty because of insufficient evidence?

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Table of Cases and Authorities Continued

CITATIONS TO JUDGMENTS BELOW

1. Petitioner, PATRICK GENE POLAND: *State* v. *Poland*, 698 P.2d 183 (Ariz. 1985).

2. Petitioner, MICHAEL KENT POLAND: *State* v. *Poland*, 698 P.2d 207 (Ariz. 1985).

JURISDICTION

The judgment of the Supreme Court of Arizona was entered on March 20, 1985, a timely motion for rehearing was denied on May 7, 1985. This courts jurisdiction is invoked under 28 U.S.C. § 1257(3). On October 7, 1985, the United States Supreme Court granted the petitioner's motions for leave to proceed *in forma pauperis* and granted the Writ of Certiorari in No. 85-5023 limited to the question of double jeopardy and also granted the petitioner's Writ of Certiorari for No. 85-5024 and consolidated the cases for oral argument.

CONSTITUTIONAL PROVISION INVOLVED

The fifth amendment to the United States Constitution states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The petitioners were indicted by the Yavapai County Grand Jury on April 26, 1979, on two counts of first degree

murder in violation of former Ariz. Rev. Stat. Ann. § 13-451 and § 13-452. The indictment alleged that the petitioners had killed two Purolator security guards on or about May 25, 1977. The trial jury found the petitioners guilty as charged by verdict dated November 24, 1979.

The law in effect at that time being Ariz. Rev. Stat. Ann. § 13-453, sets forth the punishment for murder:

> "a. A person guilty of murder in the first degree shall suffer death or imprisonment in the State prison or life, without possibility of parole until the completion of the service of twenty-five calendar years in the State prison, as determined by and in accordance with the procedures provided in § 13-454."

Pursuant to Ariz. Rev. Stat. Ann. § 13-454A, the trial judge without a jury, shall conduct a separate sentencing hearing to determine the existence or non-existence of statutory aggravating circumstances and statutory mitigating circumstances for the purpose of determining whether to impose a life or death sentence. By judicial interpretation of Ariz. Rev. Stat. Ann. § 13-454, the court may take into consideration any non-statutory mitigating circumstances. (*State* v. *Watson*, 586 P.2d 1253, cert. denied, 440 U.S. 924 (Ariz. 1978).

In conducting the hearing, information relevant to any of the statutory aggravating circumstances is governed by the rules for the admission of evidence in criminal trials. Evidence admitted during the trial relating to aggravating or mitigating circumstances shall be considered without reintroduction in the sentencing proceedings. The burden of proof in establishing the existence of statutory aggravating circumstances is upon the prosecution. (Ariz. Rev. Stat. Ann. § 13-454B, Appendix pages 135-136.) In order to impose the death penalty the trial judge must find beyond a reasonable doubt the existence

of one or more statutory aggravating circumstances. (*State* v. *Jordan*, 614 P.2d 825, cert. denied, 449 U.S. 986 (Ariz. 1980).)

The trial judge shall return a special verdict setting forth its findings as to the existence or non-existence of each of the statutory aggravating circumstances and likewise as to the statutory mitigating and non-statutory mitigating circumstances. (Ariz.Rev.Stat.Ann. § 13-454C, Appendix page 136.)

In determining whether to impose a life or death sentence the court shall take into consideration statutory aggravating circumstances and mitigating circumstances and shall impose the death penalty if it finds at least one statutory aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Ariz.Rev.Stat.Ann. § 13-454D, Appendix page 136.)

The trial judge conducted a sentencing hearing on February 29, 1980. The Respondent relied on evidence submitted during trial and requested the death penalty based upon § 13-454E(5), the petitioners committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value and § 13-454E(6), the petitioners committed the offense in an especially heinous, cruel or depraved manner. (Appendix pages 8, 9 and 10.) The petitioners presented mitigation testimony of six witnesses and requested consideration of various letters submitted to the Adult Probation office.

On April 9, 1980, the trial judge issued his special verdict finding one aggravating circumstance that the murders were especially heinous, especially cruel and especially depraved.[1] (Special Verdict, April 9, 1980,

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[1] The correct statutory provision was former Ariz.Rev.Stat.Ann. § 13-454(E)(6).

Appendix pages 15-17.) The court specifically found the statutory aggravating factors in § 13-454E(1)(2) and (3)[2] were not present. The trial judge found no statutory mitigating circumstances, but did find that the petitioners' previous reputation for good character and the close family ties that existed between the petitioners and their families were factors in mitigation. He considered the ages of the petitioners at the time of sentencing. (Appendix pages 16-17.)

The trial judge pronounced sentence on April 9, 1980, finding one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency and imposed the death penalty on each petitioner. (Sentencing Transcript, April 9, 1980, Appendix pages 11-14.)

Pursuant to Rule 26.15, Arizona Rules of Criminal Procedure, the Clerk of the Court files a notice of appeal when the death penalty is imposed. Ariz.Rev.Stat.Ann. § 13-1712(4), as amended laws 1969, Chapter 133, Section 11, (now numbered § 13-4032), authorizes the State to appeal from a ruling on a question of law adverse to the State when the petitioner was convicted and appeals from the judgment. The Respondent herein did not cross appeal.

On April 13, 1982, the Supreme Court of the State of Arizona, reversed the conviction and remanded for a new trial. (*State* v. *Poland*, 645 P.2d 784 (1982), Appendix page 34.) The reversal was based on the courts finding that the jury had been guilty of misconduct because it had considered evidence not admitted to trial. In their joint appellate brief, petitioners argued there was insufficient evi-

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[2] The correct statutory provision was former Ariz.Rev.Stat.Ann. § 13-454 E(5)

dence to support the trial court's finding of aggravating circumstances especially heinous, especially cruel and especially depraved. The Arizona Supreme Court agreed with the petitioners and responded as follows:

> We do not believe that the evidence so far produced in this case shows that the murders were cruel. We have interpreted "cruel" as "disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic." *State* v. *Lujan*, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979), quoting Webster's Third New International Dictionary. There was no evidence of suffering by the guards. The autopsy revealed no evidence that they had been bound or injured prior to being placed in the water, and there was no sign of a struggle. Cruelty has not been shown beyond a reasonable doubt. *State* v. *Lujan*, supra; *State* v. *Ortiz*, Ariz., 639 P.2d 1020 (1981); *State* v. *Bishop*, 127 Ariz. 531, 622 P.2d 478 (1980); *State* v. *Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978).
>
> Neither does the evidence support a finding that the murders were heinous or depraved. These terms were defined in *State* v. *Lujan*, supra:
>
> "heinous: hatefully or shockingly evil; grossly bad
>
> * * * *
>
> "depraved: marked by debasement, corruption, perversion or deterioration." 124 Ariz. at 372, 604 P.2d at 636.
>
> The issue focuses on the state of mind of the killer. *State* v. *Lujan*, supra. The difficulty in making this determination in the case at bar is that there is very little evidence in the record of the exact circumstances of the guards' deaths. Although defendants' state of mind may be inferred from their behavior at or near the time of the offense, *State* v. *Lujan*, supra, we know nothing of the circumstances under which the guards were held hostage.

The State must prove the existence of aggravating circumstances beyond a reasonable doubt. *State* v. *Jordan*, 126 Ariz. 283, 614 P.2d 825, cert. denied 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980). We do not believe it has been shown beyond a reasonable doubt that the murders were committed in an "especially heinous, cruel or depraved manner."

We do note, however, that the trial court mistook the law when it did not find that the defendants "committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." Ariz.Rev.Stat.Ann. § 13-454(E)(5). In so holding, the trial judge stated:

"5. The court finds the aggravating circumstance in § 13-454E(5) is not present. This presumes the legislative intent was to cover a contract killing. If this presumption is inaccurate, the evidence shows the defendants received something of pecuniary value, cash in the amount of $281,000.00.

"This, then, would be an aggravating circumstance."

It was not until after the trial in this case that we held, in *State* v. *Clark*, supra, that A.R.S. § 13-454(E)(5) was not limited to "murder for hire" situations, but may be found where any expectation of financial gain was a cause of the murder. Upon retrial, if the defendants are again convicted of first degree murder, the court may find the existence of this aggravating circumstance.

Reversed and remanded for a new trial pursuant to this opinion. (*State* v. *Poland*, 645 P.2d 784, 800, 801 (1982), Appendix pages 61-63.)

A retrial of the petitioners guilt commenced on October 18, 1982. The jury again found the petitioners guilty as charged in the indictment by verdict dated November 18, 1982. On December 9, 1982, the Respondent filed its notice of intent to seek the death sentence. (Appendix pages 64-70.)

As to the petitioner, PATRICK GENE POLAND, the Respondent alleged three aggravating circumstances:

1. The aggravating circumstance set out in Ariz.Rev.Stat.Ann. § 13-454(E)(2), the defendant was previously committed of a felony in the United States involving the use or threat of violence on another person.

2. Ariz.Rev.Stat.Ann. § 13-454(E)(5), the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

3. Ariz.Rev.Stat.Ann. § 13-454(E)(6), the defendant committed the offense in an especially heinous, cruel or depraved manner.

As to the petitioner MICHAEL KENT POLAND, the respondent sought the death penalty based upon two aggravating circumstances:

1. Ariz.Rev.Stat.Ann. § 13-454(E)(5), the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

2. Ariz.Rev.Stat.Ann. § 13-454(E)(6), the defendant committed the offense in an especially heinous, cruel or depraved manner.

The trial court conducted a sentencing hearing on December 16, 1982, and again on January 11, 1983. Petitioners filed a sentencing memorandum on January 19, 1983, raising a double jeopardy issue based upon *Bullington* v. *Missouri*, 451 U.S. 430 (1981). The trial judge issued his special verdict dated February 3, 1983.

As to the petitioner PATRICK GENE POLAND, the court found aggravating circumstance, § 13-454E(1), is

not present, that § 13-454E(2) was present in that PATRICK GENE POLAND was convicted of bank robbery on October 5, 1981, that aggravating circumstance § 13-454E(3)[3] is present, that the petitioner received something of pecuniary value, the court finds that aggravating circumstance § 13-454E(4)[4] is present in that the killings were especially heinous, cruel and depraved.

As to petitioner MICHAEL KENT POLAND, the court found the aggravating circumstances in § 13-454E(1) is not present, that aggravating circumstances in § 13-454E(2) is not present, that aggravating circumstances in § 13-454E(3)[5] is present in that the petitioner received something of pecuniary value, that aggravating circumstances in § 13-454E(4)[6] is present in that the killings were especially heinous, cruel and depraved.

With regard to statutory mitigating circumstances the court found none. As to non-statutory mitigating circumstances the court found the petitioners previous reputation for good character is not a mitigating circumstance. It did find that the petitioners had close family ties with their families and their children as a mitigating circumstance. The court considered the ages of the petitioners, MICHAEL KENT POLAND is forty-two years old and PATRICK GENE POLAND is thirty-two years old. The

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[3] The correct statutory provision was former Ariz. Rev. Stat. Ann. § 13-454 E(5).

[4] The correct statutory provision was former Ariz. Rev. Stat. Ann. § 13-454 E(6).

[5] The correct statutory provision was former Ariz. Rev. Stat. Ann. § 13-454 E(5).

[6] The correct statutory provision was former Ariz. Rev. Stat. Ann. § 13-454 E(6).

court further found the petitioners had conducted themselves as model prisoners during the pendency of the proceedings, trials and appeals. (Special Verdict dated February 3, 1983, Appendix pages 78-81.)

The trial court pronounced its judgment and sentence on February 3, 1983, finding three aggravating circumstances exist as to the petitioner PATRICK GENE POLAND and that there are no mitigating circumstances sufficient to call for leniency and imposed the death penalty. (Judgment and Sentence dated February 3, 1983, Appendix pages 5-7.) As to the petitioner, MICHAEL KENT POLAND, the court found two aggravating circumstances exist and no mitigating circumstances sufficient to call for leniency and imposed the death penalty. (Judgment and Sentence dated February 3, 1983, Appendix pages 2-4.) The trial judge further ordered that the Clerk of the Court file notice of appeal for each petitioner.

One of the issues raised by each petitioner was double jeopardy on the sentencing proceedings in that the single aggravating circumstance found by the trial court following their first trial had been struck by the Arizona Supreme Court for insufficient evidence. A unanimous court affirmed the guilt phase of the petitioners' second trial. A three member majority denied petitioners double jeopardy argument and explained their previous ruling as follows:

> "Our holding in Poland I, however, was simply that the death penalty could not be based solely upon this aggravating circumstance because there was insufficient evidence to support it. This holding was not tantamount to a death penalty "acquittal"."

(*State* v. *Poland*, 698 P.2d 183, 188 (Ariz. 1985), Appendix page 109 and *State* v. *Poland*, 698 P.2d 207 at 209 (Ariz. 1985), Appendix page 127.)

Justice Gordon and Feldman, in their dissent from reimposition of the death penalty, stated:

> A "death penalty acquittal" is final for double jeopardy purposes and the death sentence issue should not be retried even after an entirely new trial on the issue of guilt or innocence issue. (Appendix page 118.)
>
> "As previously shown, then, our reversal of defendants death penalty sentence in Poland I equalled a final acquittal on that issue and as Bullington shows that final acquittal in the first trial prevents a retrial of the death sentence in the second trial." (Appendix page 125.)

The petitioners filed motions for reconsideration which was denied by the same three judge majority with two judges voting to grant said request. (Appendix page 134.) Each petitioner timely filed a separate petition for certiorari invoking this courts jurisdiction pursuant to 28 U.S.C. § 1257(3). The petition was granted by this court on October 7, 1985, and by further order of this court the cases were consolidated.

SUMMARY OF ARGUMENT

"Double Jeopardy Clause" of the fifth amendment to the United States Constitution prevents the State of Arizona from imposing the death penalty following a new trial. *Bullington* v. *Missouri*, 451 U.S. 430 (1981) and *Arizona* v. *Rumsey*, ___ U.S. ___ 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) have held that double jeopardy applies to the bifurcated sentencing trial in a capital murder case. In this case, the Arizona Supreme Court, rather than the trial court, effectively acquitted the petitioners of the death penalty by its finding insufficient evidence in Poland I. Insufficient evidence, whether found by a trial court or an appellate court triggers double jeopardy. (*Burks* v.

United States, 437 U.S. 1 (1978) and *Green* v. *Massey*, 437 U.S. 19 (1978).)

ARGUMENT

The Arizona Supreme Court derives its jurisdiction from the Arizona Constitution. Article 6, Section 5 (3) and (5) provides:

> "The Supreme Court shall have:
>
> (3) Appellate jurisdiction in all actions and proceedings except civil and criminal actions originating in courts not of record, unless the action involves the validity of a tax, impose, assessment, toll, statute or municipal ordinance.
>
> (5) Power to make rules relative to all procedural matters in any court."

Ariz. Rev. Stat. Ann. § 12-102 provides:

> The Supreme Court shall discharge the duties imposed and exercise the jurisdiction conferred by the constitution and by law.

In exercising its authority under the Arizona Constitution, the Arizona Supreme Court has adopted 17 Ariz. Rev. Stat., Rules of Criminal Procedure, Rule 31.2B:

> "b. AUTOMATIC APPEAL WHEN DEFENDANT IS SENTENCED TO DEATH. When a defendant has been sentenced to death, the Clerk, pursuant to Rule 26.15, shall file a notice of appeal on his behalf at the time of entry of judgment and sentence."

By statutory law, the Legislature of the State of Arizona has provided, Ariz. Rev. Stat. Ann. § 13-4031:

> "The State, or any party to a prosecution by indictment or information, may appeal to the court of appeals as prescribed by law and in the manner

provided by the Rules of Criminal Procedure, except criminal actions involving crimes for which a sentence of death or life imprisonment has actually been imposed may only be appealed to the Supreme Court."

Ariz.Rev.Stat.Ann. § 13-4032, provide for appeal by the State. An appeal may be taken by the State from:

1. An order quashing an indictment or information thereof.

2. An order granting a new trial.

3. An order arresting judgment.

4. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment.

5. An order made after judgment affecting the substantial rights of the State.

6. The sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by § 13-604 or § 13-701.

7. An order granting a motion to suppress the use of evidence.

The Legislature has set forth the scope of review by the Supreme Court of Appeals in Ariz.Rev.Stat.Ann. § 13-4035:

"a. Upon appeal from a final judgment of conviction, the supreme court shall review all rulings affecting the judgment, even though a motion for a new trial was not made. If a motion for a new trial was made and denied, the court shall, on appeal from the judgment, review the action of the court below in denying a new trial. Upon appeal from an order denying a motion for a new trial or for arrest of judgment the court shall review all orders and rul-

ings made at or before the trial, or which affect the order appealed from."

"b. Upon an appeal taken by a defendant from the judgment, the Supreme Court shall review the entire record." (Formerly Ariz.Rev.Stat.Ann. § 13-1715.)

Ariz.Rev.Stat.Ann. § 13-4036, provides:

POWER OF SUPREME COURT ON APPEAL FROM JUDGMENT OF CONVICTION. The supreme court may reverse, affirm or modify the judgment appealed from, and may grant a new trial or render any judgment or make any order which is consistant with the justice and the rights of the state and the defendant. On an appeal from an order made after judgment, it may set aside, affirm, modify the order or any proceedings subsequent to or dependant upon such order.

And with regard to sentencing, the Arizona Legislature has provided in Ariz.Rev.Stat.Ann. § 13-4037:

POWER OF THE SUPREME COURT TO CORRECT AND REDUCE SENTENCE UPON APPEAL BY DEFENDANT.

A. Upon appeal by the defendant either from the judgment of conviction or from sentence, if an illegal sentence has been imposed upon a lawful verdict or finding of guilt by the court, the supreme court shall correct the sentence to correspond to the verdict or finding. The sentence as corrected shall be enforced by the court from which the appeal was taken.

B. Upon an appeal from the judgment or from the sentence on the ground that it is excessive, the court shall have the power to reduce the extent or duration of punishment imposed, if, in its opinion, the conviction is proper, but the punishment imposed is greater than under the circumstances of the case ought to be inflicted. In such case, the supreme court shall impose any legal sentence, not more severe than that

originally imposed, which in its opinion is proper. Such sentence shall be enforced by the court from which the appeal was taken.

With the aforegoing Constitutional Law, Statutory Law and Rules of Criminal Procedure in mind, what is the status of the petitioners case on their first appeal? They had raised numerous issues as to the finding of guilt and, likewise, to the imposition of the death sentence. The State of Arizona did not cross-appeal. The Arizona Supreme Court reversed the finding of guilt and remanded the matter for a new trial because the jury had been guilty of misconduct. (*State* v. *Poland*, 645 P.2d 784, 796-800 (1982), Appendix pages 53-60.) With regard to the imposition of the death penalty they found insufficient evidence to establish beyond a reasonable doubt that the offense was committed in an especially heinous, cruel or depraved manner. (*State* v. *Poland*, supra, at 800, 801, Appendix pages 61-63.)

The United States Supreme Court has twice held that due to the seriousness of the life or death penalty in capital murder cases the "sentencing trial" is a bifurcated trial separate from the "guilt trial," that double jeopardy applies to the sentencing trial and it makes no difference whether the sentencer is a jury or a judge. (*Bullington* v. *Missouri*, 451 U.S. 430 (1981); *Rumsey* v. *Arizona*, ___ U.S. ___ 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984).)

The distinguishing feature between Bullington, Rumsey and petitioners case, is that Bullington and Rumsey received a life sentence at their first sentencing trial which was sought to be increased or was increased to death. Whereas, the petitioners received the death sentence at the first sentencing trial.

The United States Supreme Court has previously held that the double jeopardy clause precludes a second trial

once the reviewing court has found the evidence legally insufficient. The only just remedy available being the direction of acquittal. (*Burks* v. *United States*, 437 U.S. 1 (1978).)

The principal of appellate acquittal based upon insufficiency of evidence as opposed to procedural error or the weight of evidence has been applied to the states. (*Green* v. *Massey*, 437 U.S. 19 (1978). This court has further explained the meaning of Burks in *Hudson* v. *Louisiana* 450 U.S. 40 (1981), where it was held Burks is not limited to "no evidence" to support the charge or the elements thereof but rather it applies where there is a finding of legally insufficient evidence.

The Arizona Supreme Court held in *State* v. *Rumsey*, 665 P.2d 48, 55 (Ariz. 1983):

> "While we have an independent duty of review, we perform it as an appellate court, not as a trial court. We have never held that if the trial court finds sufficient mitigating circumstances we have independent power to reject its factual and legal conclusions and impose the death penalty. Our obligation on review is to determine whether "the punishment imposed is greater than the circumstances of the case warrant." (*State* v. *Richmond*, 114 Ariz. at 196, 560 P.2d at 51.) In capital cases we necessarily undertake an independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances . . . [to] determine for ourselves if the latter outweigh the former . . . Our proportionality review is not to determine whether the life imprisonment was too lenient, but, rather, to determine "whether the sentences of death are excessive or disproportionate."

It is the petitioners logic that death penalty jeopardy attached when the trial court conducted its sentencing

hearing on February 29, 1980, because for jeopardy it has never made a difference whether a case was tried before a judge or a jury. (*United States* v. *Morrison*, 429 U.S. 1 (1976).)

The Arizona Supreme Court on the first appeal was presented with the issue of whether or not there was sufficient evidence to support the sole aggravating circumstances found by the sentencer to support the death penalty. The Arizona Supreme Court in its opinion of April 13, 1982, clearly indicated the aggravating circumstances found by the trial court must fail because of insufficient evidence. (Appendix pages 61-62.) Although the court below did not use the specific words, that the petitioners have been acquitted of the death penalty, no other rational conclusion can be obtained under the panoply of *Burks* v. *United States*, supra, *Green* v. *Massey*, supra, *Hudson* v. *Louisiana*, supra and *Rumsey* v. *Arizona*. The court below, by its finding of insufficient evidence, in effect reversed the petitioners death sentence constituting a final acquittal.

The Arizona Supreme Court takes the position that double jeopardy as applied to the sentencing trial is limited to the situation where the first trial results in the imposition of a life sentence, (Appendix page 109) and relied upon *Knapp* v. *Cardwell*, 667 F.2d 1253, 1264-65 (9th Cir.), cert. denied, 459 U.S. 1055 (1982). It is submitted Knapp does not apply to this case. In Knapp, the respective petitioners arguments were based upon the constitutionality of the Arizona death penalty statute as interpreted in *State* v. *Watson*, 586 P.2 1253 (Ariz. 1978). Of the thirty-four petitioners involved (See *Knapp* v. *Cardwell*, 513 F.Supp.4 (1980)) only the petitioner *Valencia* was in the position of having been resentenced pursuant to *State* v. *Watson*, supra, whereupon the trial court

found an additional aggravating circumstance not found at his original sentencing. (*State* v. *Valencia*, 602 P.2d 807 (Ariz. 1979). The Arizona Supreme Court in its opinion did not specifically address double jeopardy.

In *Knapp* v. *Cardwell*, 667 F.2d 1253, 1265, (1982, cert. denied, 459 U.S. 1055 (1982), the court held:

> "In light of our finding that the Watson change in interpretation of § 13-454 is procedural and ameliorative and in light of our finding that Bullington is distinguishable we hold that this does not constitute double jeopardy."

Petitioners submit their position is distinguishable from *Knapp* v. *Cardwell*, supra. The law of Arizona capital punishment has been clarified by *Rumsey* v. *Arizona*, supra, and the petitioners second sentencing trial was not occassioned by procedural error.

Last, but not least, Ariz.Rev.Stat.Ann. § 13-454 requires that the sentencer make specific findings as to each aggravating circumstance. Such procedure leaves nothing to doubt as to the sentencers' ruling on each aggravating circumstance. Just as the state, in order to convict for first degree murder, must establish a person unlawfully killed a human being with malice of forethought and premeditation, the petitioners submit upon conviction of a first degree murder, the prosecution must prove beyond a reasonable doubt at least one or more of the elements set forth in Ariz.Rev.Stat.Ann. § 13-454(F) before consideration of the alternative of a life sentence.

The petitioners position is not without authority, *Jones* v. *Thigpen*, 741 F.2d 805 (5th Cir. 1984), cert. pending, (*Thigpen* v. *Jones*, No. 84-1237, filed January 30, 1985). In *Young* v. *Kemp*, 760 F.2d 1097, 1101 (11th cir. 1985) (cert. pending, *Kemp* v. *Young*, No. 85-121 filed July 18, 1985):

> "We conclude that the previous judgment of this court left intact the district courts' finding of insufficient evidence to support the death penalty, that being the case, the double jeopardy principles announced in *Burks* v. *United States*, 437 U.S. 1, 98th S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Bullington* v. *Missouri*, 451 U.S. 30 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), prevent the state from seeking the death penalty in Young's trial."

Likewise, in *Godfrey* v. *Francis*, 613 F.Supp. 747, 753-755 (D.C.GA. 1985), basing its opinion on the United States Supreme Courts' decision in *Godfrey* v. *Georgia*, 446 U.S. 420 (1980) to be a finding that this court found the record lacking in evidence to support a finding beyond a reasonable doubt that Godfrey's crime was outrageously or wantonly vile, horrible or inhuman, held:

> "The State had its opportunity to force Godfrey to undergo the most severe test that exists in our legal system: standing trial for ones life. Having weathered the crucible once, Godfrey should not be put to the test again. Therefore, should the State choose to try Godfrey again, it may not seek to reimpose the death penalty."

CONCLUSION

Based upon *Bullington*, supra, *Rumsey*, supra, *Burks*, supra, *Green* v. *Massey*, supra, *Hudson* v. *Louisiana*, supra, and the Arizona Supreme Courts finding of insufficient evidence following the first sentencing trial, it is requested that this Court issue its Writ of Certiorari to the State of Arizona reversing the judgment of the Arizona Supreme Court and remanding this matter with direction that the State of Arizona may not impose the

death penalty upon the petitioners because double jeopardy applies.

Respectfully submitted

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